Supreme Court, U.S.
FILED
APR 19 2011
OFFICE OF THE CLERK

No. 10-757

IN THE
Supreme Court of the United States

MICHAEL NEWDOW, ET AL.;

Petitioners,

v.

JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES, ET AL.;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

Michael Newdow
In pro per and Counsel of Record for Petitioners
Post Office Box 233345
Sacramento, CA 95823

(626) 532-7694
NewdowLaw@gmail.com

QUESTIONS PRESENTED

By Petitioners:

> Whether the United States Court of Appeals for the District of Columbia Circuit erred by ruling that there is no redressability when a plaintiff's rights are abridged by individuals carrying out the President's wishes.

By Respondents:

> Whether the court of appeals correctly held that petitioners lack standing to challenge the possible inclusion of the phrase "so help me god" and prayer in the 2013 and 2017 presidential inaugural ceremonies.

TABLE OF CONTENTS

INTRODUCTION 1

PROCEEDINGS IN THIS COURT 2

ANALYSIS 2

I. Respondents Do Not Address the Arguments Made in the Petition for Certiorari 2

II. The Arguments Made by Respondents Are Inconsequential 5

III. The Merits Question Is Not Before the Court 12

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Center for Arms Control & Non-Proliferation v. Pray, 531 F.3d 836 (D.C. Cir. 2008) 8
City of Boerne v. Flores, 521 U.S. 507 (1997) 5
Evans v. Newton, 382 U.S. 296 (1966) 6
FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) 7
Franklin v. Massachusetts, 505 U.S. 788 (1992) 3, 10

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 11
Glover River Org. v. United States Dep't of the Interior, 675 F.2d 251 (10th Cir. 1982) 9
Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) 6
Lee v. Weisman, 505 U.S. 577 (1992) 7
Loving v. Virginia, 388 U.S. 1 (1967) 4
Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir. 2001) 10
Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997) 7
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 4
Swan v. Clinton, 100 F.3d 973 (D.C. Cir. 1996) 10
United States v. Nixon, 418 U.S. 683 (1974) 1
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 4

Other Authorities

John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375 (2006) 1

Websites

http://fpc.state.gov/114510.htm 6

INTRODUCTION

This case involves a challenge to the governmental espousal of Monotheism that, over the last eighty years, has become an integral part of the nation's presidential inaugurations. In a split decision,[1] the United States Court of Appeals for the District of Columbia Circuit ruled that Plaintiffs (Petitioners here) lack standing because the judicial branch cannot redress their injuries.

The potential ramifications of this ruling are alarming. In the wake of the D.C. Circuit's standing analysis, a vast array of potential actions against executive branch actors are now to be dismissed because any "[f]uture President could simply find other willing assistants not subject to the injunction to carry out his wishes." Pet. App. 18-19. In other words, whenever a "future President is free to use any decisionmaking process he desires ... and is not obligated to consult anybody," he need not "take any cognizance of the opinions issuing from this court." Pet. App. 22.

Thus, in the "court with special responsibility to review legal challenges to the conduct of the national government," John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 389 (2006), it has been decreed that "a President is above the law." *United States v. Nixon*, 418 U.S. 683, 715 (1974) (emphasis added to state the contrary to the point *Nixon* was making). Surely, such a ruling cannot be permitted to stand.

---

[1] The opinion of the Court of Appeals, reported at 603 F.3d 1002, is provided at Pet. App. 1-42. Although Judge Kavanaugh concurred in the judgment, he disagreed with the panel majority's standing determination. Pet. App. 23-28.

PROCEEDINGS IN THIS COURT

A Petition for Certiorari in this case was filed by Plaintiffs on September 27, 2010. A Brief for the Federal Respondents in Opposition (hereafter "Br. in Opp.") was filed on April 8, 2011. Pursuant to Supreme Court Rule 15.6, Petitioners now file this Reply Brief.

ANALYSIS

I. Respondents Do Not Address the Arguments Made in the Petition for Certiorari

In his concurrence, Judge Kavanaugh found that redressability exists in this case:

> As to the causation and redressability elements of standing, plaintiffs' alleged injury is fairly traceable to the defendants here – namely, the officer who recites the official Presidential oath (the Chief Justice) and the entity that runs the events and organizes the speakers (the Presidential Inaugural Committee). ... An injunction against the named defendants is therefore also likely to redress plaintiffs' alleged injuries.

Pet. App. 26-27 (citations omitted). Yet, just as the panel majority failed to address Judge Kavanaugh's redressability arguments in its opinion, Respondents

here fail to address the arguments made by Plaintiffs in their Petition.

Instead, Respondents parrot the analysis used by the panel majority:

> Because the content of the inaugural ceremony is entirely dependent on the president or president-elect's wishes, only a judicial order running against the president or president-elect would result in the relief that petitioners seek.

Br. in Opp. at 7-8. That *non sequitur*, however, is completely contrary to this Court's jurisprudence:

> [W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Franklin v. Massachusetts, 505 U.S. 788, 803 (1992). Thus, a judicial order running against the President's underlings would provide Plaintiffs with redress. *See* Petition for Certiorari at 10-14.

As was also noted in the Petition, the inevitable separation-of-powers issues that would result from a lawsuit against the President can be obviated by "recogniz[ing] that the scope of Presidential immunity from judicial process differs significantly from that of Cabinet or inferior officers," 505 U.S. at 826 (Scalia, J., concurring in part and concurring in

the judgment), and that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Id.* at 828.

Respondents do not seriously examine or discuss these matters. Like the panel majority, they never even attempt to explain how the inaugural setting differs in any constitutionally significant manner from the myriad other settings where executive branch activity is "entirely dependent" upon the president's wishes. With "settled law [being] that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States," *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982), they allege there is some impenetrable barrier even to jurisdiction over his minions.

This case concerns the rights of a large body of citizens to the protections of the first ten words of the Bill of Rights. That is obviously a broad public interest, and "[w]hen judicial action is needed to serve broad public interests ... the exercise of jurisdiction [over the President/executive branch] has been held warranted." *Nixon*, 457 U.S. at 754. It might be recalled that enjoining the chief executive's subordinates "from executing a direct Presidential order," *id.* at n.36 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952)), was considered appropriate even when (in *Youngstown*) a vital governmental need was hanging in the balance. Where (as here) all that hangs in the balance is the infusion of the nation's most important ceremony with activities "directly subversive of the principle of equality," *Loving v. Virginia*, 388 U.S. 1, 12 (1967), enjoining those who are doing the President's bidding must be appropriate as well.

"The power to interpret the Constitution in a case or controversy remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). It will be a meaningless power, however, if the other branches of government are given free reign to act contrary to that interpretation. That will be the result if Respondents' argument prevails and the Judiciary ceases to exercise its jurisdiction due to unjustified separation-of-powers concerns.

II. The Arguments Made by Respondents Are Inconsequential

Respondents throw together a hodgepodge of inconsequential arguments that can be readily dispensed with. Because Plaintiffs are unable to discern any cohesive thesis to those arguments, they will be addressed in the order presented in the Brief in Opposition.

In regard to the denial of redressability "[b]ecause the content of the inaugural ceremony is entirely dependent on the President or President-elect's wishes," Br. in Opp. 7, one can simply consider other constitutional violations to highlight the flawed nature of the argument. Could a president also racially segregate the inaugural's bathrooms, ban nearby demonstrations, exclude women, and order the National Guard to incarcerate every attendee who voted Republican because those actions, also, were his "wishes"? And, if so, what would limit such actions to inaugurations? Under Respondents' theory, all presidential "wishes" could be carried out with impunity by any of his subordinates. Surely, this cannot be a correct interpretation of the law.

The arguments in the Brief in Opposition's note 4 are straw men. Plaintiffs have never asked a court "to enjoin the President in the performance of his executive duties." Br. in Opp. 8 n.4. Nor have they ever had any desire for "this court to declare unlawful the personal religious expression of a private citizen like the President-elect.' Pet. App. 20." Br. in Opp. 8 n.4. It is only against inferior officials that Plaintiffs seek an injunction, and it is not the religious expression of private citizens, but of public officials acting on behalf of the government, that they aim to have declared unlawful.

Even if some of the defendants in this case are not public officials, this Court has "said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995). After all, "[t]he Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'" *Id.* at 392 (citation omitted). Moreover, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966). Thus, when the Constitution is being violated at "the transcendent ritual of America's democracy and representative government,"[2] which the D.C. Circuit previously acknowledged to be "an event less private than

---

[2] As described by Donald R. Kennon, Ph.D., Chief Historian of the United States Capitol Historical Society. (Remarks of January 14, 2009, given at the Foreign Press Center, accessed on April 16, 2011 at http://fpc.state.gov/114510.htm.)

almost anything else conceivable," *Mahoney v. Babbitt*, 105 F.3d 1452, 1457 (D.C. Cir. 1997), it is specious to speak of the official infusion of that event with homage to a deity as merely "the personal religious expression of a private citizen."

The argument that "Petitioners' claim against the JCCIC, the AFIC, and their chairpersons is not redressable for the additional reason that the JCCIC and the AFIC ... have now ceased to exist," Br. in Opp. at 8 n.5, readily falls under the doctrine of "capable of repetition but evading review":

> [T]he established exception to mootness for disputes capable of repetition, yet evading review ... applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."

FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007) (citations omitted). As in FEC, "[b]oth circumstances are present here." *Id.*

Respondents argue that the President has "complete discretion over whether to have a ceremony at all, what responsibilities (if any) to give the committees, which individuals to invite to participate in the ceremony, and—most importantly—what content to request of the participants." Br. in Opp. at 9. They then allude to *Lee v. Weisman*, 505 U.S. 577, 586 (1992), contending that redressability in the instant case is

"distinguishable" from redressability in *Lee* because of these characteristics. Br. in Opp. at 9 n.6. Yet, just like the school officials in *Lee*, the President is "responsible for deciding whether to invite clergy to deliver invocations and benedictions at [the] ceremonies." *Br. in Opp.* at 9 n.6. Similarly, just as "policy permitted, but did not require, school principals to invite clergy to deliver prayers at graduation ceremonies," *id.*, policy permits, but does not require, presidents to invite clergy to deliver prayers at inaugurations. To whatever degree such policies exist – at high school graduations or national presidential inaugural ceremonies – they are trumped by the Establishment Clause.

As for the "complete discretion" the President has in directing an inaugural ceremony, a case raised by Respondents themselves demonstrates this is hardly a unique situation. In *Center for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836 (D.C. Cir. 2008) (discussed in Br. in Opp. at 10 n.7), the President had "complete discretion" to establish the commission at issue. Additionally, in *Pray* (as in the case at bar), it could have been contended that "if some potential participants were subject to an injunction limiting their ability to take part, the President ... would exercise his authority over the content of the [commission] by choosing individuals who are able to participate in the manner that he wishes." Br. in Opp. at 9-10. Yet, the *Pray* court specifically stated that:

> Even if the Center's claims against the Commission and its executive director became moot when the Commission relinquished custody of

> its records and ceased to exist, this case is not moot because, regardless whether mandamus relief is available, a declaration of the Center's legal right to the materials could form the basis of an injunction against the NSC, which would redress the Center's claimed injury.

Pray, 531 F.3d at 839 n.* (citations omitted).

Glover River Org. v. United States Dep't of the Interior, 675 F.2d 251 (10th Cir. 1982), also raised by Respondents, bolsters Plaintiffs' claims as well. In *Glover*, a flood control organization sought an injunction against the Secretary of the Interior because he had listed a fish as a threatened species, allegedly without first filing a required Environmental Impact Statement. The Tenth Circuit found that the organization lacked standing because "[n]o stipulated facts or record testimony supports the existence of a substantial nexus between the relief requested and the elimination of plaintiff's injury." 675 F.2d at 255. That is completely inapposite to the instant case, where that nexus is incontrovertible.

Where *Glover* is on point relates to the Tenth Circuit's having "no difficulty in concluding that **the potential** for recurring flooding in the absence of the construction of dams or other flood control projects constitutes a sufficient injury for standing purposes." *Id.* at 254 (emphasis added). The flood control organization in *Glover* referenced flooding that had occurred ten years prior to the appellate court's decision, and it was quite possible that similar flooding would never recur within the lifetime of any

organization member. This is totally contrary to inaugurations, which have occurred every four years since the nation was founded, and which have incorporated the challenged infusions of Monotheism in every one of the nineteen public inaugural ceremonies since 1937. *See* Complaint, Appendix B.

Also unavailing are Respondents' attempts to distinguish the instant case from those in which judicial review of executive branch decisions has been upheld by this Court. Whether or not the President has discretion to act – which, in actuality, he had in *Franklin v. Massachusetts*, 505 U.S. 788 (1992) – the expectation remains "that the President 'would abide by [the court's] authoritative interpretation'" of the law. Br. in Opp. at 10 (citing *Franklin*, 505 U.S. at 803).

Similarly, the contention that *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996) and *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001), are inapposite (due to some statutory authority granted to the President's subordinates), *see* Br. in Opp. at 11, is without any basis. If one may expect (for standing purposes) "that the President 'would abide by [the court's] authoritative interpretation'" of the law, then the same expectation must exist for any other individual performing governmental activity.[3]

---

[3] In their discussion of *Swan* and *Made in the USA*, Respondents write that "Petitioners suggest (see Pet. 3) that their claims against respondents must be redressable because there must be a remedy for alleged violations of the Establishment Clause that take place during the inaugural ceremony." Br. in Opp. at 11 n.8. Petitioners made no such suggestion at all. Their claims against respondents are redressable because the relief requested will provide redress.

Respondents' half-hearted attempt to argue that "petitioners cannot identify any concrete and particularized injury arising from the possibility that prayer and the phrase 'so help me god' will appear in future inaugurations," Br. in Opp. at 12, is clearly without merit. It is true that the panel majority chose to "assume, without holding, that plaintiffs' claimed injury is an injury in fact and that it can be fairly traced to the conduct of the defendants." Pet. App. at 15. However, as Judge Kavanaugh ably demonstrated in his concurrence, the injury in fact and causation requirements of standing exist. Pet. App. at 23-26. Petitioners need not restate the relevant arguments at this time. Suffice it to say that they personally suffer the injuries that stem from being unwillingly forced to confront the challenged government-sponsored religious pronouncements.

As Judge Kavanaugh further noted, this Court "has consistently decided Establishment Clause cases involving objections to government-sponsored religious displays or speech in public settings." Pet. App. at 24. If "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines,'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990) (citations omitted), it may fairly be assumed that the members of this Court adhered to that independent obligation in those cases. Accordingly, the respective plaintiffs must have met all standing requirements, including those for injury in fact and causation. Thus, again (in this "Establishment Clause cas[e] involving objections to government-sponsored religious displays or speech in [a] public settin[g]"), Plaintiffs here also meet those requirements.

III. The Merits Question Is Not Before the Court

Respondents' final argument is that "even if petitioners had standing, their Establishment Clause challenge is without merit." Br. in Opp. at 12. The merits question, however, was not raised in the "Question Presented" by either Petitioners or Respondents, *see* page i, *supra*, and has not been addressed by Petitioners. Should the Court choose to consider that issue, Petitioners will gladly follow the Court's lead. Until that time, however, the merits question is not appropriate for discussion in terms of granting or denying the Petition. *See* Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").

CONCLUSION

The precedent that will be established by the panel majority's opinion is extremely dangerous, with the potential to immunize the executive branch from judicial review for a host of constitutional transgressions in a breathtaking array of circumstances. Respondents, in their Brief in Opposition, have done nothing to dispel the need for concern regarding that danger. Accordingly, Petitioners respectfully request that this Court grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Michael Newdow
In pro per and Counsel of Record for Petitioners
Post Office Box 233345
Sacramento, CA 95823
(626) 532-7694
NewdowLaw@gmail.com